Supreme Court, U.S.
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No.

In the Supreme Court of the United States

PAUL B. MARTIN

Petitioner,

v.

STATE OF KANSAS

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Kansas

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Police officers detain individuals in a variety of circumstances while conducting a check for an outstanding arrest warrant—for example, individuals may be stopped randomly on the street during "sweeps" of particular neighborhoods or detained in automobiles (as drivers or passengers). If the warrant check reveals an outstanding warrant, the individual seized is arrested and subjected to a search, which may reveal drugs or other contraband.

The lower courts are sharply divided on the frequently-recurring question whether—if the initial seizure of the individual was unlawful—evidence discovered pursuant to the search is admissible at trial. Some courts hold that the evidence should be suppressed because the detention was unlawful; others have concluded that the discovery of the outstanding warrant vitiates the taint of the illegal detention. The question presented is:

Whether an officer's discovery of an outstanding warrant during a concededly illegal detention initiated for the purpose of conducting a warrant check is an "intervening circumstance[]" (*Brown* v. *Illinois*, 422 U.S. 590, 603-04 (1975)) that removes the taint of the illegal detention and permits the introduction of evidence obtained in a search incident to an arrest on the outstanding warrant.

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STATUTE

28 U.S.C. § 1257 1

PETITION FOR A WRIT OF CERTIORARI

Petitioner, Paul B. Martin, respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of Kansas in this case.

OPINIONS BELOW

The opinion of the Supreme Court of Kansas (App., *infra*, 1a-17a) is reported at 179 P.3d 457. The opinion of the Court of Appeals of Kansas (App., *infra*, 18a-22a) is reported at 151 P.3d 865. The district court's decision from the bench denying the motion to suppress (App., *infra*, 23a), is unreported.

JURISDICTION

The judgment of the Supreme Court of Kansas was entered on March 28, 2008. This Court's jurisdiction rests on 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT

Police officers frequently seize individuals in order to conduct a check for any outstanding arrest warrants for the individual seized. Under police de-

partment policies discussed in reported decisions, including the decision below, it is standard procedure in many jurisdictions to conduct such checks as part of virtually every encounter in which an officer participates. The number of decisions addressing this fact pattern confirms the widespread use of the procedure.

If a warrant is discovered, the individual is arrested and searched. That search may uncover illegal drugs or other contraband, which typically produces a new charge against the individual. When the seizure is lawful—either because the individual voluntarily agreed to remain with the officer or because the officer's actions were supported by reasonable suspicion—the contraband seized may be introduced into evidence to support the new charge.

But the seizure of the individual sometimes will be illegal because it violates the Fourth Amendment, typically on the ground that the police lacked reasonable suspicion to detain the individual in order to conduct the warrant check. Here, for example, the State did not challenge in the Kansas Supreme Court the holding of the court of appeals that the seizure of petitioner was unlawful. In that situation, because the contraband discovered in the post-arrest search is a fruit of the illegal seizure, the contraband is subject to suppression under the exclusionary rule.

Numerous courts have addressed the question whether evidence nonetheless is admissible because discovery of an outstanding warrant sufficiently attenuates the taint of the illegal seizure under this Court's decision in *Brown* v. *Illinois*, 422 U.S. 590 (1975). These courts have reached sharply conflicting results, with some holding that the discovery of the warrant does attenuate the taint and some holding that it does not. That means that similarly situated

individuals are subject to different legal rules depending on where in the country their case arises. This Court should grant review to resolve this disagreement among the lower courts.

A. Background

On the evening of June 16, 2005, police officers observed a man in an alley behind a church who appeared to be preparing to urinate on the church. After the man admitted his intention, the officers allowed him to leave, and the man picked up his bicycle and rode away. App., *infra*, 3a.

One of the officers then noticed a second bicycle on the sidewalk. Getting out of his car, he "saw another individual down the sidewalk about 20 feet or so" who "looked as though, to [the officer], he was also looking in the direction of the church possibly." Supp. Tr. 7.[1] Finding it "strange" that the two individuals had proceeded in different directions, the officer had "suspicions that we could possibly be looking at a burglary on the church, I don't know what, but it * * * seemed very strange." *Ibid.* The Kansas Court of Appeals observed that "[n]o such burglary had been reported, nor did the officers indicate any other aspect of the circumstances to justify such suspicion." App., *infra*, 20a-21a.

The officer stopped this second individual, petitioner Paul Martin, and requested his name and date of birth in order to run a warrant check. The officer testified that this request was "[s]tandard. We usually run peoples' names when we stop them. * * * I would say 90-plus percent of the time when we stop someone we do." Supp. Tr. 10.

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[1] "Supp. Tr." Refers to the transcript of the July 20, 2005 suppression hearing.

Mr. Martin provided the requested information; and the warrant check revealed an outstanding warrant. Mr. Martin was arrested on that warrant and a search incident to the arrest revealed a tin containing marijuana. App., *infra*, 3a.

B. Proceedings Below

Mr. Martin was charged with unlawful possession of marijuana. He moved to suppress the tin of marijuana on the grounds that it was obtained as the result of an unlawful seizure.

The district court denied the motion. App., *infra*, 23a. It held that it was permissible for the officer to run the warrant check because "[a]n officer can always run a search. * * * Once there is a warrant confirmed, the arrest is fine. The search incident to arrest is also fine pursuant to statute and case law." *Ibid.*

The Court of Appeals of Kansas reversed. App., *infra*, 18a-22a. It observed at the outset that petitioner's counsel had conceded that the officers' initial encounter with Mr. Martin was voluntary, but contended that it became involuntary when Mr. Martin was detained for the warrant check. The court "disagree[d] that any stop was justified" because the officers had no reasonable articulable suspicion that Mr. Martin was engaged in criminal activity. *Id.* at 20a.

Assuming that the initial encounter was voluntary, the court concluded that it lost its consensual character when Mr. Martin was detained for the warrant check. "Even though the detention was as brief as 5 minutes, an individual is seized when an officer restrains his or her freedom, even if that detention is brief." App., *infra*, 22a. Because "[w]hether one focuses on the initial stop or the detention as an extension of a purported voluntary encounter, * * *

Martin should not have been detained for a wants and warrants check under these circumstances," the court held that the evidence should have been suppressed. *Ibid.*

The Supreme Court of Kansas reversed the court of appeals, holding that the trial court properly denied the suppression motion. App., *infra*, 1a-17a. Because the State had failed to seek review of the court of appeals' determination that "Martin was being unlawfully detained during the warrant check," the supreme court restricted its analysis to "whether the discovery of an outstanding arrest warrant during an unlawful detention is an intervening event which removes the taint of the unlawful detention from evidence retrieved in a search incident to the warrant arrest." *Id.* at 6a-7a.

The supreme court looked to this Court's decision in *Brown* v. *Illinois*, 422 U.S. 590 (1975), "to determine whether the causal chain has been sufficiently attenuated, so as to dissipate the taint of illegal conduct." App., *infra*, 14a. The first factor—"the time elapsed between the illegality and the acquisition of the evidence"—"weigh[ed] heavily against the State" because the officers' actions "were continuous; there was no temporal break in the causal chain between illegality and evidence acquisition." *Id.* at 14a, 15a.

The court next considered the discovery of the warrant, stating that "the lawful warrant arrest for a prior crime, and ensuing lawful search incident to arrest, represent a potential break in the causal chain between the unlawful conduct of illegally detaining Martin and the retrieval of the challenged evidence." App., *infra*, 15a. Finally, it observed that "[w]hile the circumstances might suggest that the officers' purpose in requesting identification to run a

warrant check was a fishing expedition, we do not perceive the conduct to be flagrant" and "the intrusion upon Martin's privacy was a brief conversation in which Martin cooperatively engaged." *Id.* at 16a.

Based on "the minimal nature and extent of official misconduct, the outstanding arrest warrant was an intervening circumstance which sufficiently attenuated the taint of the unlawful detention" to permit the admission of the evidence. App., *infra*, 16a-17a.

REASONS FOR GRANTING THE PETITION

Evidence generally may not be admitted against a defendant when it has been obtained through unconstitutional means. See, *e.g.*, *Wong Sun* v. *United States*, 371 U.S. 471 (1963). Although "evidence is [not] 'fruit of the poisonous tree' simply because it would not have come to light but for the illegal actions of the police," evidence will be inadmissible if it "has been come at by exploitation of that illegality." *Hudson* v. *Michigan*, 547 U.S. 586, 592 (2006) (quoting *Wong Sun*, 371 U.S. at 487-88). That determination turns on whether, "granting establishment of the primary illegality, the evidence * * * has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint." *Brown* v. *Illinois*, 422 U.S. 590, 599 (1975) (citation and internal quotation marks omitted).

The decision below rests upon the remarkable conclusion that an illegal seizure for the purpose of conducting a warrant check is sufficiently distinguishable from the discovery of an outstanding warrant during that very warrant check to permit the introduction of evidence that is the product of that illegal seizure. If that reasoning is correct, police offi-

cers may conduct street sweeps, detaining citizens at will for the purpose of conducting warrant checks, without fear of any consequence for such violations of the Fourth Amendment. *Brown*'s principle does not apply where its effect would be to eliminate entirely the deterrent effect of the exclusionary rule. Given the conflict among the lower courts, the frequently-recurring nature of the issue, and the stark inconsistency between the rationale adopted below and this Court's decisions, review by this Court is plainly warranted.

A. The Lower Courts Are Divided On The Question Presented.

State and federal courts have reached conflicting conclusions as to whether the discovery of an outstanding arrest warrant is an "intervening circumstance" permitting the introduction of evidence that is the product of an illegal seizure when the purpose of the seizure was to enable the police to conduct the warrant check.

Several courts have determined that the discovery of an outstanding warrant from a warrant check conducted during an unlawful seizure does not permit the introduction of evidence uncovered in a search incident to arrest on the warrant charge—precisely the opposite of the result reached by the court below.

In *State* v. *Daniel*, 12 S.W.3d 420 (Tenn. 2000), the Tennessee Supreme Court determined that the defendant, a pedestrian, was unlawfully seized when he was detained so that the officer could conduct a warrant check. It held that discovery of the warrant did ***not*** permit introduction of the evidence: "the drugs found in [the defendant's] pocket [after discovery of the arrest warrant] * * * must be suppressed

as fruit of the poisonous tree since no intervening event or other attenuating circumstance purged the taint of the initial illegal seizure." *Id.* at 422 n.2 & 428 (internal quotation marks omitted); see also *United States* v. *Luckett*, 484 F.2d 89 (9th Cir. 1973) (per curiam) (police impermissibly detained the defendant to run a warrant check and found an outstanding warrant; evidence found in the subsequent search was properly suppressed).

People v. *Mitchell*, 824 N.E.2d 642, 650 (Ill. App. Ct. 2005), involved a defendant walking on the street who was subjected to an unlawful seizure while a police officer ran a warrant check. The officer testified that "it is his practice, whenever he comes into contact with people, to run warrant checks on them." *Id.* at 644. The check revealed a warrant, the defendant was arrested, and the subsequent search uncovered narcotics.

The court held that "the purpose of the stop"—to run a warrant check—"was directly related to the arrest of defendant, which then led directly to the search of defendant. * * * * [T]he answer to the question, whether the evidence was obtained by exploiting the original illegality, is undeniably yes." 824 N.E.2d at 649-50. The court accordingly affirmed the suppression of the evidence.

Other courts—by contrast—agree with the conclusion reached by the court below, holding that the discovery of an arrest warrant dissipates the taint of an unlawful seizure even though the purpose of the seizure was to conduct the warrant check that revealed the outstanding warrant. See *Cox* v. *State*, 916 A.2d 311, 316 (Md. 2007); *Golphin* v. *State*, 945 So.2d 1174, 1193 (Fla. 2006); *United States* v. *Simpson*, 439 F.3d 490, 496 (8th Cir. 2006); *State* v. *Page*,

103 P.3d 454, 459-60 (Idaho 2004); *State* v. *Hill*, 725 So.2d 1282, 1286-87 (La.1998).

The conflict among the lower courts is clear.

B. This Case Squarely Presents An Issue Of Substantial Practical Importance.

The question presented here arises frequently, and the conflict among the lower courts produces substantial disparity and uncertainty in the administration of criminal justice. The Court should grant review to provide much-needed guidance to lower courts and law enforcement.

Police officers routinely perform a check for outstanding warrants when they encounter individuals in a variety of circumstances. During routine traffic stops, field interviews, even when dealing with jaywalkers (see *United States* v. *Luckett*, *supra*), police "view a warrants check as a routine feature of almost any citizen encounter." *Golphin*, 945 So.2d at 1202 (Pariente, J., concurring). See also *Mitchell*, 824 N.E.2d at 644 (officer testified that "whenever he meets someone on the street, he runs a warrant check on that individual"); *State* v. *Baez*, 894 So.2d 115, 116 (Fla. 2004) (per curiam) (policy during police-initiated encounters to "run a routine warrant check"); *State* v. *Topanotes*, 76 P.3d 1159, 1160 (Utah 2003) (performing a warrant check is "routine procedure" or "common practice"); *State* v. *Jones*, 17 P.3d 359, 360 (Kan. 2001) (officer testified that "it was his standard operating procedure to obtain identification from every person in a vehicle and run a records check on the passengers") (internal quotation marks omitted); *Magee* v. *State*, 759 So.2d 464, 466 (Miss. Ct. App. 2000) (warrant checks are "routine" during police-initiated encounters with pedestrians); *Hill*, 725 So.2d at 1288 (Lemmon, J., concurring) (describ-

ing police policy to run a "check for outstanding warrants" during consensual police-pedestrian encounters as "routine police procedure"); *Wilson* v. *State*, 874 P.2d 215, 222 (Wyo. 1994) (officer testified that department's policy was to conduct national and local warrant checks of everyone police "contact" late at night).

Indeed, the officer testifying at the suppression hearing in this case stated that "[w]e usually run peoples' names [to conduct a warrant check] when we stop them. * * * I would say 90-plus percent of the time when we stop someone we do." Supp. Tr. 10.

The sheer frequency with which intermediate state appellate courts address the question presented confirms the commonplace nature of the procedure. See, *e.g.*, *Birch* v. *Commonwealth*, 203 S.W.3d 156, 157 (Ky. Ct. App. 2006) ("regardless of the potential illegality of the police officer's initial contact with Birch, the outstanding arrest warrant was an independent, untainted ground for the arrest"); *People* v. *Rodriguez*, 49 Cal. Rptr. 3d 811, 813 (Ct. App. 2006) ("evidence seized in a lawful search incident to a lawful arrest based upon an outstanding warrant should be suppressed if the police invented the ground for the traffic stop which led to the discovery of the warrant"); *McBath* v. *State*, 108 P.3d 241, 242 (Alaska Ct. App. 2005) ("regardless of the potential illegality of the investigative stop, the pre-existing arrest warrant was an independent, untainted ground for McBath's arrest"); *Mitchell*, 824 N.E.2d at 650 (finding the "evidence was obtained by exploiting the original illegality" regardless of discovery of outstanding arrest warrant); *State* v. *Affsprung*, 87 P.3d 1088, 1095 (N.M. Ct. App. 2004) (conducting "a wants and warrants check constituted an unlawful detention of Defendant" that tainted the evidence ob-

tained); *Hardy* v. *Commonwealth*, 149 S.W.3d 433, 436 (Ky. Ct. App. 2004) ("discovery of the outstanding warrant for [the defendant's] arrest was "sufficient to dissipate any taint caused" by an illegal detention).

The pervasive uncertainty surrounding the question presented in this case creates unseemly and divergent outcomes within the Nation's courts and intolerable confusion in the policing of the Nation's streets. These inconsistencies warrant immediate resolution by this Court.

The practical result of the lower courts' divergent views of the question presented is that the governing legal rule varies from State to State, producing inconsistent treatment of defendants and unclear standards for police officers. Police in Tennessee, for instance, have since 2000 operated under the clear constitutional rule that they may not detain citizens to conduct a warrant check in the absence of reasonable suspicion of criminal activity. If this rule is violated, even if an outstanding warrant is discovered, any evidence obtained through a search incident to arrest on that warrant is inadmissible.

Maryland's highest court has held that regardless of the legality of such a detention, any evidence found in a search incident to arrest resulting from an outstanding warrant discovered during the detention is admissible. These contradictory approaches to the question presented can only be reconciled by this Court's review.

The Court should not tolerate continued application of these conflicting legal standards with respect to an issue that recurs so frequently. The Fourth Amendment should be enforced in the same manner throughout the country. Review by this Court is necessary to achieve that uniformity.

C. Discovery Of An Outstanding Warrant Does Not Vitiate The Taint From The Illegal Seizure Of An Individual To Conduct A Warrant Check.

This Court held in *Brown* v. *Illinois*, *supra*, that the exclusionary rule will not apply if the connection between the illegality and the seizure of the evidence "ha[s] become so attenuated as to dissipate the taint." 422 U.S. at 598 (citation and quotation marks omitted). The Court identified three considerations relevant in determining whether the evidence "'has been come at by exploitation of [the] illegality or instead by means sufficiently distinguishable to be purged of the primary taint'"—the "temporal proximity" between the illegal seizure and obtaining the evidence; "the presence of intervening circumstances"; and "the purpose and flagrancy of the official misconduct." *Id.* at 599, 603-04 (citation and footnote omitted)

The *Brown* inquiry is fact-dependent, but cases involving an illegal detention for a warrant check all follow an identical pattern: an individual is seized unlawfully for the purpose of conducting a warrant check; the warrant check is conducted and a warrant is discovered; and the individual then is arrested and searched. These facts provide no basis for a finding of attenuation. Rather, they demonstrate why exclusion of the evidence found in the post-arrest search is essential to fulfill the purposes of the exclusionary rule.

To begin with, the discovery of the evidence is always proximate in time to the unlawful seizure. The reason the individual is seized is to conduct a warrant check; the check therefore occurs within minutes of the seizure, and the arrest and search follow quickly when the officer learns of the out-

standing warrant. As the Kansas Supreme Court acknowledged here, "[t]here was no temporal break in the causal chain between illegality and evidence acquisition." App., *infra*, 15a.

Deeming the discovery of an outstanding warrant an "intervening circumstance," the second *Brown* factor, would ignore the fact—again common to all of these cases—that the interaction was initiated by the police for the purpose of finding an outstanding warrant.

An intervening circumstance is one that breaks the relationship between the illegal conduct and the evidence obtained. That a warrant might be discovered is predictable—indeed, it is the reason for the illegal seizure—and the warrant accordingly cannot vitiate the taint from the intimately-related illegal seizure.

For the same reason, the third factor—the purpose of the illegal conduct—weighs heavily against a finding of attenuation. The purpose of these illegal seizures is to enable the warrant checks. That close linkage precludes a finding of attenuation. This plainly is a situation in which—in the words used by this Court in *Brown*—the evidence "has been come at by exploitation of" the illegal seizure not by "means sufficiently distinguishable to be purged of the primary taint." 422 U.S. at 599 (citation and internal quotation marks omitted).[2]

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[2] The court below stated that "[t]he warrant arrest of [petitioner] was a lawful, perhaps mandatory, act" and that the arrest and subsequent search "represent a potential break in the causal chain" vitiating the taint of the illegal seizure. App., *infra*, 15a. But those circumstances are always present when a person is illegally seized for the purpose of conducting a warrant check. The court's rationale would therefore apply in every

Indeed, if police illegally detain someone to conduct a warrant check, it is obviously foreseeable that they might discover a warrant. Allowing the admission of evidence obtained incident to the arrest on the warrant gives officers an extremely strong incentive to engage in suspicionless seizures for the purpose of warrant checks. Discovery of a warrant accordingly cannot logically be viewed as attenuating illegality in the manner contemplated by this Court's decisions.

This conclusion is especially appropriate because the concept of attenuation is intended to avoid the suppression of evidence in circumstances in which suppression would not deter unconstitutional police conduct. As Justice Powell suggested in his concurring opinion in *Brown*, "[t]he notion of the 'dissipation of the taint' attempts to mark the point at which the detrimental consequences of illegal police action become so attenuated that the deterrent effect of the exclusionary rule no longer justifies its cost." *Brown*, 422 U.S. at 609 (Powell, J., concurring).

"[T]he value of deterrence depends upon the strength of the incentive to commit the forbidden

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case. And the court ignored the fact that, far from breaking the chain, the discovery of the warrant that authorized the search was the very purpose of the illegal seizure and thus closely tied to the Fourth Amendment violation.

The Kansas court also stated that the officers' conduct was not flagrant because their goal was not to search petitioner for drugs. App., *infra*, 16. As in all of these warrant check cases, however, the objective goal of their illegal seizure was to conduct the warrant check. The conduct was flagrant because of this direct connection between the reason for the unlawful act and the search that uncovered the contraband. See *Brown*, 422 U.S. at 605. (finding conduct flagrant where "[t]he impropriety of the arrest was obvious").

act." *Hudson*, 547 U.S. at 595. If the exclusionary rule were inapplicable in this category of cases, police officers would have a powerful incentive to conduct unconstitutional fishing expeditions for open warrants.

Suppressing the evidence is "the only way to deter the police from randomly stopping citizens for the purpose of running warrant checks"; under the contrary rule adopted by the court below "there would be no reason for the police not to stop whomever they please to check for a warrant." *Mitchell*, 824 N.E.2d at 650. "To hold that the discovery of a warrant * * * remove[s] the taint of the [illegal seizure] * * * would be akin to holding that the substance of a confession obtained by coercion removes the taint of the coercive practices used to obtain it." *Ibid.*

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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JUNE 2008

APPENDICES

APPENDIX A

Supreme Court of Kansas.
STATE of Kansas, Appellee,
v.
Paul B. MARTIN, Appellant.
No. 96,126.
March 28, 2008.

Syllabus by the Court

1. When a defendant seeks to suppress evidence, claiming that a search resulted from an unlawful detention, the State has the burden of proving that the search was lawful.

2. A party that does not brief an issue is deemed to have waived or abandoned that issue.

3. Under the attenuation doctrine, a court may find that the poisonous taint of an unlawful search or seizure has dissipated because the connection between the unlawful law enforcement conduct and the challenged evidence became attenuated.

4. In determining whether the causal chain between unlawful conduct and the acquisition of evidence has been sufficiently attenuated, three factors are analyzed: (1) the time elapsed between the illegality and the acquisition of the evidence; (2) the presence of intervening circumstances; and (3) the purpose and flagrancy of the official misconduct. No single factor is necessarily dispositive.

5. A law enforcement officer who discovers an outstanding arrest warrant on an unlawfully detained person is permitted to execute the warrant by arresting the subject of the warrant.

6. The discovery of an outstanding arrest warrant may be an intervening circumstance which re-

moves the taint of an illegal detention from the evidence acquired in a subsequent, permissible search incident to arrest, depending upon the purpose and flagrancy of the official misconduct that created the illegal detention.

Juanita M. Carlson, of Carlson Law Office, P.A., of Lawrence, argued the cause and was on the brief for appellant. Brenda J. Clary, assistant district attorney, argued the cause, and Deborah L. Moody, assistant district attorney, Charles Branson, district attorney, and Phill D. Kline, attorney general, were with her on the brief for appellee.

The opinion of the court was delivered by JOHNSON, J.:

In his prosecution for possession of marijuana, Paul B. Martin unsuccessfully moved to suppress the evidence retrieved from his pocket. On appeal, the Court of Appeals reversed the district court and found that the evidence should have been suppressed. *State* v. *Martin*, No. 96,126, 2007 WL 519080, unpublished opinion filed February 16, 2007.

The State of Kansas seeks review, claiming that the Court of Appeals erred in failing to consider how the discovery of Martin's outstanding arrest warrant should affect the lawfulness of the search and that the Court of Appeals erroneously based its decision upon a theory that was not presented to the district court or briefed on appeal. Finding that the discovery of the arrest warrant presented an intervening event which removed the taint of the illegality of the preceding unlawful detention, we reverse.

The Court of Appeals succinctly described the factual background as follows:

> "After officers observed a man exhibiting physical activity similar to that of someone attempting to urinate, they confronted the man and asked if that was his intent. He admitted his intent to urinate, and one of the officers told him, 'You were honest, why don't you just get out of here.' The man mounted his bicycle and rode away. The officers then noticed a second bicycle and saw Martin standing about 20 feet away. Although the arresting officer would later admit that he 'didn't see [Martin's] motion' and '[didn't] know what he intended to do,' the officers 'stopped' Martin and asked for his identification. Martin was cooperative, identified himself, and provided his date of birth. When the officers ran his name and birthdate through dispatch, they discovered an outstanding warrant for his arrest. Upon Martin's arrest the officers searched his person and found an Altoids tin containing a substance confirmed as marijuana." *Martin*, slip op. at 2.

In the ensuing prosecution for possessing the marijuana, Martin moved to suppress the evidence. Although defense counsel conceded that the initial encounter was permissible, Martin's attorney argued that the encounter became an unlawful detention when the officer called dispatch for a wants and warrants check. The district court announced that, because the defense had raised no issue as to the initial

stop, the court would not address it. Declaring that it is always permissible for an officer to run a warrant check, the district court denied the motion to suppress.

Martin was convicted of possession of marijuana at a bench trial upon stipulated facts at which Martin preserved the suppression issue for appeal. Upon direct appeal, the Court of Appeals noted trial counsel's concession that the initial stop was a voluntary encounter, but opined that it "[disagreed] that any stop was justified." Slip op. at 4-5. Nevertheless, the Court of Appeals proceeded to analyze whether the encounter lost its consensual nature and became unlawful when the officers detained Martin to conduct a wants and warrants check. The Court of Appeals concluded:

> "Whether one focuses upon the initial stop or the detention as an extension of a purported voluntary encounter, we conclude that Martin should not have been detained for a wants and warrants check under these circumstances, and we reverse the district court's refusal to suppress the evidence revealed during the subsequent search of his person." Slip op. at 6.

In its petition for review, the State argues that the Court of Appeals erred by: (1) failing to consider the controlling authority of *State* v. *Jones*, 270 Kan. 526, 17 P.3d 359 (2001); and (2) reversing the district court based upon a theory which was not presented to the district court or briefed on appeal. We take the liberty of considering the issues in reverse order.

BASIS FOR COURT OF APPEALS DECISION

The State complains that neither the district court nor the Court of Appeals was presented argument on the theory used by the appellate court to reverse the denial of the suppression motion. We disagree.

As the State points out in its review petition, the suppression motion alleged that the officer checked with dispatch without having "reasonable, articulable suspicion that the defendant had been committing a crime, was about to commit a crime or had committed a crime." Trial counsel argued that, although the encounter was permissibly initiated, it became unlawful when the officer detained Martin to run the warrant check. In his brief to the Court of Appeals, one of Martin's issues was stated as, "[w]hether Mr. Martin's encounter with Officer Walter initially was a voluntary encounter then became an illegal investigatory detention when the officer ran a warrant check without reasonable articulable suspicion."

As noted above, the Court of Appeals analyzed the very issue presented, *i.e.*, whether the officer was unlawfully detaining Martin when the officer ran the warrant check. Even if the opinion's discussion of the legality of the initial encounter is gratuitous, the ultimate holding directly addressed the theory of unlawfulness presented to both the district court and the Court of Appeals.

The State also argues that because of the manner in which the issue was presented below, it was denied the opportunity "to present evidence to prove the lawfulness of the encounter or provide details regarding the sequence and timing of events." Pointedly, however, the State begins by reciting the provi-

sions of K.S.A. 22-3216(2), which specifically provides that "the burden of proving that the search and seizure were lawful shall be on the prosecution." Once Martin raised the issue of the lawfulness of extending the encounter to run a wants and warrants check, the State had the burden of proving the actions of law enforcement were lawful. That burden would include the detailing of the sequence and timing of events in order to prove that the extended encounter was not an unlawful detention. In short, the State had ample notice and opportunity to address the specific issue and theory upon which the case was decided.

THE EFFECT OF THE OUTSTANDING WARRANT

In its brief to the Court of Appeals, the State argued that the encounter remained voluntary up to the time that the outstanding warrant was discovered and Martin was arrested on that warrant. However, it also relied on its *Jones* argument that the officers had a right to arrest Martin upon discovering the outstanding warrant, regardless of whether Martin was being unlawfully detained when the warrant was discovered. See *Jones*, 270 Kan. at 527, 17 P.3d 359.

In its petition for review, the State does not present any argument as to whether Martin was being unlawfully detained during the warrant check. Rather, the petition for review asserts that the Court of Appeals' error was in failing to apply the holding in *Jones*. Specifically, the petition recites:

> "While the State does not concede that Martin was detained, legally or otherwise, the holding in *Jones* dictates that even if he had been unlaw-

> fully detained, the arrest was lawful, and consequently, the evidence obtained during a search incident to the arrest was lawfully obtained."

Although the State purports to disavow any concession with respect to the Court of Appeals' determination that Martin was unlawfully detained for a wants and warrants check, its failure to present any argument on the question effects the same result. See *State* v. *Walker*, 283 Kan. 587, 594, 153 P.3d 1257 (2007) (an issue not briefed is deemed waived or abandoned). Indeed, consideration of the State's review petition issue on the applicability of the *Jones* holding would be rendered unnecessary without the existence of an unlawful detention. Therefore, we will restrict our analysis to the question the State has presented us upon review, *i.e.*, whether the discovery of an outstanding arrest warrant during an unlawful detention is an intervening event which removes the taint of the unlawful detention from evidence retrieved in a search incident to the warrant arrest.

The Jones Decision

Because the State relies exclusively on *Jones*, we pause to review that decision in some detail. The *Jones* scenario began with a traffic stop of a speeding vehicle in which Jones was a passenger. The detaining law enforcement officer asked for Jones' driver's license, in addition to that of the vehicle driver. Jones denied having any identification, but provided his name and birth date. The officer testified that his "standard operating procedure" was to obtain identification and run a records check on all passengers in a stopped vehicle so that they would be available to testify in any court proceeding that might

arise from the traffic citation. After being advised by dispatch that Jones had an outstanding warrant, the officer asked Jones to exit the vehicle. Jones exited, but then fled on foot. After he caught Jones, the officer searched Jones' coat and discovered narcotics and drug paraphernalia, for which Jones was prosecuted and convicted.

On appeal, the Court of Appeals, after considering whether the district court should have granted Jones' motion to suppress the evidence, affirmed the convictions. *State* v. *Jones*, 27 Kan.App.2d 476, 5 P.3d 1012 (2000). The Supreme Court granted review and commenced its opinion by declaring that "[t]he sole issue in this case is whether Jones' Fourth Amendment rights were violated when a law enforcement officer asked him his name and date of birth after a routine traffic stop in which Jones was a passenger and not the driver of the vehicle." *Jones*, 270 Kan. at 526, 17 P.3d 359. However, the *Jones* court did not specifically address Jones' argument that an officer's asking for a passenger's name and date of birth during a routine traffic stop violates the passenger's Fourth Amendment right to be free from an unreasonable search and seizure. Rather than answering the question of whether Jones was being unlawfully detained, the *Jones* court simply said:

> "The problem with Jones' argument in this case is that once [the officer] determined there was a warrant out for Jones' arrest, [the officer] had a right to arrest Jones, whether he had been lawfully or unlawfully detained at that point in time. Once [the officer] had a right to lawfully arrest Jones on the outstanding warrant, [the officer] had a right to search him

> incident to the arrest. See *United States* v. *Green*, 111 F.3d 515, 521 (7th Cir.1997)." 270 Kan. at 527-28, 17 P.3d 359.

The *Jones* opinion then quotes from *Green*, a 7th Circuit case which found that the lawful arrest of a passenger upon an outstanding warrant "'constituted an intervening circumstance sufficient to dissipate any taint caused by the illegal automobile stop.'" *Jones*, 270 Kan. at 528, 17 P.3d 359 (quoting *United States* v. *Green*, 111 F.3d 515, 521 [7th Cir.1997]). Jones goes on to briefly mention and quote from an Illinois Court of Appeals case, *People* v. *Murray*, 312 Ill.App.3d 685, 691-92, 245 Ill.Dec. 430, 728 N.E.2d 512 (2000), which declared that "'[i]t would be illogical and nonsensical for us to hold that once the police illegally stop an automobile, they can never arrest an occupant who is found to be wanted on a warrant.'" The brief analysis in *Jones* concludes by stating the holding in a Louisiana Supreme Court case, *State* v. *Hill*, 725 So.2d 1282 (La. 1998), "that the discovery of an outstanding arrest warrant constitutes an 'intervening circumstance' which dissipates the taint of an initial impermissible encounter," and by listing the cases upon which the Louisiana Supreme Court relied. *Jones*, 270 Kan. at 528-29, 17 P.3d 359.

The final paragraph in *Jones* recites:

> "We hold that there is no evidence of bad faith on the part of [the law enforcement officer]. Once [the officer] learned of the outstanding warrant, he had a right and duty to arrest Jones. Subsequent to the arrest, [the officer] had the right to search Jones. We affirm the trial court and Court of

> Appeals." 270 Kan. at 529, 17 P.3d 359.

The opinion does not flesh out the significance of its holding that the officer did not act in bad faith, in light of the court's earlier suggestion that the discovery of an outstanding warrant is a bright line event rendering immaterial any inquiry into the lawfulness of the detention at the time of the warrant's discovery. Perhaps more curious is the court's reliance on decisions from foreign jurisdictions without mentioning its own prior decisions, especially *State* v. *Damm*, 246 Kan. 220, 787 P.2d 1185 (1990).

Before proceeding to discuss *Damm*, we pause to note that Martin argued and the Court of Appeals analyzed the factual distinction between a vehicle stop, as in *Jones*, and an encounter on the street, as presented here. The distinction may be important to the detention analysis, given that we have declared every vehicle stop to be a detention, *State* v. *Mitchell*, 265 Kan. 238, Syl. ¶ 2, 960 P.2d 200 (1998) ("A traffic stop is a seizure within the meaning of the Fourth Amendment."), while an encounter on the street is not always deemed a detention. See *State* v. *Lee*, 283 Kan. 771, Syl. ¶ 2, 156 P.3d 1284 (2007) ("A voluntary or consensual encounter is the only type of encounter between citizens and law enforcement officers that does not implicate the protection of the Fourth Amendment."). However, the starting point for our discussion is that Martin was unlawfully seized when the outstanding warrant was discovered. Therefore, the distinction between a vehicle stop and a street encounter does not affect our analysis.

The Damm Decision

In *Damm*, an officer stopped the vehicle Damm was driving because of defective taillights. The officer gathered the driver's licenses from Damm and his two passengers and returned to the patrol car to do a "routine records check." The officer discovered an outstanding warrant on one of the passengers, who was then arrested and placed in the patrol car. The officer returned to the stopped vehicle and searched it incident to the passenger's arrest. After discovering drug paraphernalia and cocaine in the vehicle, all three occupants were arrested for drug possession.

In upholding the district court's suppression of the evidence, the *Damm* court found that the officer "had no reasonable justification for requiring identification of the passengers and running record checks on them." 246 Kan. at 224-25, 787 P.2d 1185. Thus, the seizure of all three vehicle occupants, including the driver, was rendered unreasonable because it exceeded the scope and duration justified by the traffic stop. The court then explained:

> "Without the unreasonable detention, the officer had no reason to arrest [the passenger with an outstanding warrant] or [Damm and the other passenger]. Without the arrest, there could be no search. Without the search, there was no evidence against Damm. The detention and search being unlawful, the evidence is inadmissible as fruit of the poisonous tree. *Wong Sun* v. *United States*, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963); *State* v. *Epperson*, 237 Kan. at

719 [703 P.2d 761]." *Damm*, 246 Kan. at 225, 787 P.2d 1185

Reconciliation

Damm employed a "but for" analysis to determine that everything following the unreasonable seizure was fruit of the poisonous tree under *Wong Sun*, and, thus, inadmissible. The opinion focused on the fact that the officer would not have *learned* of the outstanding warrant without first unlawfully seizing the passenger. *Damm* does not consider the dilemma presented by the officer's acquisition of that knowledge.

The discovery of an outstanding arrest warrant informs the law enforcement officer that a judge has found "that there is probable cause to believe both that a crime has been committed and that the [subject of the warrant] has committed it." K.S.A. 22-2303(1). The officer would understand that it would be his or her duty to execute that warrant by arresting the person named in the warrant. See K.S.A. 22-2305. The *Damm* court did not clarify whether the preceding unlawful detention rendered the warrant arrest unlawful or just precluded prosecution for the resulting new crime revealed by the search incident to the arrest. However, given that the warrant was issued upon a probable cause showing that had nothing to do with the unlawful detention and the officer is commanded by a judge to execute the warrant by arresting the fugitive, one must conclude that the arrest on the warrant is not invalidated by the unlawful detention.

The State does not discuss *Damm*, but rather it takes the position that both the warrant arrest and the new prosecution are permissible. The State perceives that the unstated, underlying rationale of

Jones is that "Martin had no liberty to be protected" because "a judge had signed a warrant ordering Martin's arrest." While the State may wish that to be so, *Jones*' holding of an absence of officer bad faith would make no sense if Jones possessed no liberty interest to protect. Moreover, such an inference cannot be reconciled with *Damm*, which found that the passenger subject to an outstanding warrant in that case was nevertheless unreasonably seized. Such a finding necessarily presupposes that the passenger had a protected liberty interest which could be violated notwithstanding the existence of an outstanding warrant.

We perceive that *Damm* and *Jones* are reconciled by recognizing that neither case establishes a bright line rule. The discovery of an outstanding arrest warrant does not always automatically wipe the slate clean for an officer unlawfully detaining the subject of the warrant. On the other hand, an unlawful detention that begets knowledge of an outstanding arrest warrant does not always automatically immunize the fugitive from prosecution for crimes discovered during the warrant arrest. In that regard, we note that the exclusionary rule is not absolute.

> "'We need not hold that all evidence is "fruit of the poisonous tree" simply because it would not have come to light but for the illegal actions of the police. Rather, the more apt question in such a case is "whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distin-

> guishable to be purged of the primary taint. Maguire, Evidence of Guilt, 22 (1959)." [*Wong Sun* v. *United States*,] 371 U.S. at 487-88 [83 S.Ct. 407]."' *State* v. *Hodges*, 252 Kan. 989, 1006, 851 P.2d 352 (1993).

Under the attenuation doctrine, courts have found that the poisonous taint of an unlawful search or seizure dissipates when the connection between the unlawful police conduct and the challenged evidence becomes attenuated. *Nardone* v. *United States*, 308 U.S. 338, 60 S.Ct. 266, 84 L.Ed. 307 (1939). Although the *Jones* opinion did not explicitly apply the attenuation doctrine, that doctrine appears to be the only way to explain its reference to officer bad faith and to reconcile it with the holding in *Damm*.

The *Green*, *Murray*, and *Hill* cases relied upon by *Jones* cite to *Brown* v. *Illinois*, 422 U.S. 590, 95 S.Ct. 2254, 45 L.Ed.2d 416 (1975), which applied three factors to determine whether the causal chain has been sufficiently attenuated, so as to dissipate the taint of illegal conduct. Those factors are (1) the time elapsed between the illegality and the acquisition of the evidence; (2) the presence of intervening circumstances; and (3) the purpose and flagrancy of the official misconduct. *Brown*, 422 U.S. at 603-04, 95 S.Ct. 2254. Presumably, *Jones*' holding of an absence of officer bad faith referred to the third factor. However, all of the factors appear to be germane to the important determination of whether the State can avoid the exclusionary rule for its agents' unlawful conduct.

Below, neither the district court nor the Court of Appeals engaged in a taint analysis. Nevertheless,

we are empowered to do so, if given a sufficient record on appeal. *See State* v. *Gonzales*, 36 Kan.App.2d 446, 459, 141 P.3d 501 (2006); *State* v. *Crowder*, 20 Kan.App.2d 117, 122, 887 P.2d 698 (1994).

The first factor weighs heavily against the State. Indeed, at oral argument, the State emphasized the short amount of time which elapsed between the initial encounter and the arrest with accompanying search. The law enforcement officers' actions were continuous; there was no temporal break in the causal chain between illegality and evidence acquisition. However, *Brown* instructed that "[n]o single fact is dispositive" in determining whether the evidence should be suppressed. *Brown*, 422 U.S. at 603, 95 S.Ct. 2254; *see Green*, 111 F.3d at 521.

The second factor, the presence of intervening circumstances, brings the outstanding arrest warrant into play. Under that circumstance, the law enforcement officer was put on notice that a court had determined there was probable cause to believe that Martin had committed a crime and that the court had issued an order for law enforcement to take Martin into custody. The warrant arrest of Martin was a lawful, perhaps mandatory, act. Thereupon, K.S.A. 22-2501 permitted, and officer safety recommended, that the officer search Martin's person. Thus, the lawful warrant arrest for a prior crime, and ensuing lawful search incident to arrest, represent a potential break in the causal chain between the unlawful conduct of illegally detaining Martin and the retrieval of the challenged evidence.

The third factor, the purpose and flagrancy of the official misconduct, dovetails with the second factor in this case. The determination of whether the in-

tervening circumstance of discovering an outstanding warrant should attenuate the taint of a preceding unlawful detention, should be influenced by the officers' reasons for detaining the subject and the flagrancy of the invasion on the subject's privacy. In other words, did the officer exploit the unlawful conduct to get to the contraband. *Cf. United States* v. *Melendez-Garcia*, 28 F.3d 1046, 1055 (10th Cir.1994) ("[T]he 'purpose and flagrancy' prong of the *Brown* test can only be aimed at exploring whether the police have exploited their illegal search.").

While the circumstances might suggest that the officers' purpose in requesting identification to run a warrant check was a fishing expedition, we do not perceive the conduct to be flagrant. The officers were drawn to the particular location because they observed a man who admitted to urinating or attempting to urinate in public. There is nothing to suggest that the officers' ultimate goal in making contact with Martin, who was in the immediate vicinity of the urinator, was to search his person for drugs. Indeed, that suggestion is belied by the officers' treatment of the lawbreaker, who was simply sent on his way after admitting to his transgression. Further, the intrusion upon Martin's privacy involved a brief conversation in which Martin cooperatively engaged. But *cf. State* v. *Epperson*, 237 Kan. 707, 712, 703 P.2d 761 (1985) (citing *United States* v. *Brignoni-Ponce*, 422 U.S. 873, 878, 95 S.Ct. 2574, 45 L.Ed.2d 607 [1975]) (even a brief detention is a seizure implicating Fourth Amendment).

Accordingly, we find that, considering the minimal nature and extent of the official misconduct, the outstanding arrest warrant was an intervening circumstance which sufficiently attenuated the taint of

the unlawful detention so as to permit the admission of the fruits of the search incident to arrest.

Judgment of the Court of Appeals is reversed. Judgment of the district court is affirmed, and the case is remanded for further proceedings.

APPENDIX B

Court of Appeals of Kansas.
STATE of Kansas Appellee,
v.
Paul B. MARTIN Appellant.
No. 96,126.
Feb. 16, 2007.

Before RULON, C.J., GREENE and HILL, JJ.

MEMORANDUM OPINION

PER CURIAM.

Paul B. Martin appeals the district court's denial of his motion to suppress evidence found in his pocket after he was detained and arrested, arguing that his initial detention was illegal. We agree and reverse.

Factual Background

After officers observed a man exhibiting physical activity similar to that of someone attempting to urinate, they confronted the man and asked if that was his intent. He admitted his intent to urinate, and one of the officers told him, "You were honest, why don't you just get out of here." The man mounted his bicycle and rode away. The officers then noticed a second bicycle and saw Martin standing about 20 feet away. Although the arresting officer would later admit that he "didn't see [Martin's] motion" and "[didn't] know what he intended to do," the officers "stopped" Martin and asked for his identification. Martin was cooperative, identified himself, and provided his date of birth. When the officers ran his name and birthdate through dispatch, they discovered an outstanding warrant for his arrest. Upon Martin's arrest the officers searched his person and

found an Altoids tin containing a substance confirmed as marijuana.

Martin was charged with unlawful possession of marijuana in violation of K.S.A 65-4162(a)(3). Prior to trial he filed a motion to suppress the evidence revealed during the search of his person, arguing that Martin's detention was without reasonable suspicion that he had been or was currently involved in criminal activity. After an evidentiary hearing, the district court denied the motion and set the matter for trial. At a trial on stipulated facts, Martin was convicted as charged. He appeals the denial of his motion to suppress.

Scope of Review

The State bears the burden of proof at a suppression hearing. It must prove to the trial court the lawfulness of the search and seizure. *State* v. *Shelton*, 278 Kan. 287, 292, 93 P.3d 1200 (2004); *State* v. *Grace*, 28 Kan.App.2d 452, 456, 17 P.3d 951, *rev. denied* 271 Kan. 1039 (2001). This court reviews the factual findings underlying the trial court's suppression decision by a substantial competent evidence standard and the ultimate legal conclusion drawn from those factual findings by a de novo standard. Appellate courts do not reweigh the evidence. *State* v. *Rupnick*, 280 Kan. 720, 727, 125 P.3d 541 (2005). This court neither passes on the credibility of witnesses nor resolves conflicts in the evidence. *State* v. *Ackward*, 281 Kan. 2, 8, 128 P.3d 382 (2006).

Analysis

The district court focused upon the legality of running a records search on Martin's identity as a part of the encounter and found that "an officer can always run a [records] search." The court then con-

cluded that given the outstanding warrant for Martin's arrest, the subsequent arrest and search incident to arrest were "also fine pursuant to statute and case law." We believe this conclusion was likely the result of a misfocused argument by Martin's counsel, but we hold that the applicable case law directs an alternative legal analysis that results in the inescapable conclusion that the evidence must be suppressed.

Our appellate courts have recognized that encounters between police and citizens may be categorized into four types: voluntary encounters, investigatory stops, public safety stops, and arrests. *State* v. *Gonzalez*, 36 Kan.App.2d 446, 451, 141 P.3d 501 (2006). Voluntary encounters are not considered seizures within the meaning of the Fourth Amendment to the United States Constitution. *State* v. *Crowder*, 20 Kan.App.2d 117, 119, 887 P.2d 698 (1994). A voluntary encounter will not trigger Fourth Amendment scrutiny unless it loses its consensual nature. *Florida* v. *Bostick*, 501 U.S. 429, 434, 111 S.Ct. 2382, 115 L.Ed.2d 389 (1991).

Apparently, counsel for Martin conceded to the district court that the officers were engaged in a voluntary encounter with Martin, but argued that the encounter went too far when Martin was detained for a "wants and warrants" record check. We disagree that any stop was justified; the officers admitted in undisputed testimony that they saw no suspicious movements and had no idea what Martin's intentions might have been. According to the testimony of one of the officers, Martin was "stopped" exclusively because the presence of two persons on bicycles "increased my suspicion that we could possibly be looking at a burglary on the church." No such burglary had been reported, nor did the officers indicate any

other aspect of the circumstances to justify such suspicion. We do not consider the stop to have been based upon reasonable articulable suspicion that Martin was involved in criminal activity, but we acknowledge the concession by defense counsel and examine the nature of the encounter.

If it is assumed the initial stop had been justified as a voluntary encounter, did it lose its consensual nature by reason of the detention for a wants and warrants check? We believe that detention for a wants and warrants check has been treated differently depending on whether it is incident to a valid traffic stop or incident to another type of citizen encounter. In *Gonzalez*, a panel of this court held that conducting an investigation (including wants and warrants check and a request to search) "clearly exceeded the scope of a public safety stop," 36 Kan.App.2d at 458, 141 P.3d 501, noting that "an encounter ceases to be consensual when an officer takes the individual's identification card back to the police car to run background checks." 36 Kan.App.2d at 456, 141 P.3d 501 (citing *Grace*, 28 Kan.App.2d at 458, 17 P.3d 951); see also *State* v. *Damm*, 246 Kan. 220, Syl. ¶ 3, 787 P.2d 1185 (1990) (unreasonable to conduct wants and warrants check on all passengers in vehicle incident to routine traffic stop); *State* v. *Epperson*, 237 Kan. 707, Syl. ¶ 3, 703 P.2d 761 (1985) (whenever authorities arrest and restrain a person, he or she has been seized within the meaning of the Fourth Amendment); *State* v. *Beichle*, No. 87,467, unpublished opinion filed August 9, 2002, slip op. at 6 (An encounter that began as voluntary "lost its consensual nature when the officers took [the defendant's] driver's license, ran a warrants check, and then asked to pat him down. The situation escalated

into an investigatory stop without articulable facts to support a reasonable suspicion of criminal activity.").

Although the officers did not take a driver's license from Martin, they took his identification information and detained him during the wants and warrants check. Even though the detention was as brief as 5 minutes, an individual is seized when an officer restrains his or her freedom, even if that detention is brief. *See State* v. *Reason*, 263 Kan. 405, 410-11, 951 P.2d 538 (1997).

Whether one focuses upon the initial stop or the detention as an extension of a purported voluntary encounter, we conclude that Martin should not have been detained for a wants and warrants check under these circumstances, and we reverse the district court's refusal to suppress the evidence revealed during the subsequent search of his person.

Reversed.

APPENDIX C

IN THE DISTRICT COURT OF DOUGLAS COUNTY, KANSAS
STATE OF KANSAS, Plaintiff,
vs.
PAUL B. MARTIN, Defendant.
Case No. 05 CR 950.
Transcript of Motion Hearing

Had before the HONORABLE PAULA B. MARTIN, Judge of Division V of the District Court of Douglas County, Kansas, at Lawrence, Kansas, on the 20th day of July, 2005.

* * * * *

THE COURT: I won't address the issue of the stop since that's not being raised as an issue, and determine only whether it was permissible for the officer to run a warrants search once he knew Mr. Martin's name. An officer can always run a search. I don't know of any authority that would prevent running any person's name through to see if there is an active warrant. Once there is a warrant confirmed, the arrest is fine. The search incident to arrest is also fine pursuant to statute and case law.

And as far as opening the tin, Mr. Jones has correctly stated that there is case law supporting the fact that it doesn't make any sense to prevent an officer from doing at the scene what he could do minutes later at the jail and when Mr. Martin arrived at the jail a detailed inventory would be done and this would be found at that time. So, the motion to suppress is denied.

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AUG 18 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

(3)

No. 08-2

IN THE

Supreme Court of the United States

PAUL B. MARTIN,

Petitioner,

v.

STATE OF KANSAS,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Kansas

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the discovery of an outstanding arrest warrant for a defendant stopped by police, which leads to the discovery of illegal drugs following a search incident to arrest, dissipates any "taint" from any alleged illegality regarding the initial stop of the defendant?

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STATEMENT

Petitioner fails to demonstrate that the Kansas Supreme Court decided an important federal issue in a way that conflicts with decisions on the same issue by state courts of last resort or federal circuits. Nor does Petitioner demonstrate that the Kansas Supreme Court's judgment is incorrect or inconsistent with this Court's decisions; instead, like virtually all other state supreme courts and federal circuits, the Kansas court followed and applied the Court's decision in *Brown v. Illinois*, 422 U.S. 590 (1975). The factbound application of settled law by a state supreme court in a run-of-the-mill, minor, criminal case does not warrant an exercise of this Court's plenary jurisdiction.

Even a cursory reading of the facts as set forth in the lower court opinions reveals that this was not a case of the police randomly stopping someone on the street to run a warrant check. Nor does this case involve any sort of "sweep" with police stopping all pedestrians to run warrant checks with no basis for suspecting any particular individual of anything. Instead, even if the stop here in some way violated constitutional requirements, it was not without basis (Petitioner was one of two men the police encountered, one of whom admitted his intent to urinate on a church). Nor is there any evidence of police abuse or flagrant misconduct. Rather, the officers arrested and searched Petitioner based on a valid outstanding warrant, a warrant the officers discovered based on information obtained from what

even Petitioner's counsel below conceded was a *voluntary* encounter. App. 20a. Petitioner's purported fear of a police-state run amok is simply fantasy. The petition should be denied.

REASONS FOR DENYING THE WRIT

I. PETITIONER FAILS TO DEMONSTRATE A CONFLICT OF AUTHORITY WARRANTING AN EXERCISE OF THIS COURT'S PLENARY JURISDICTION.

Supreme Court Rule 10(b) makes clear that a grant of the writ of certiorari to review a state supreme court is warranted only when such a court "has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals." Petitioner completely fails to satisfy that standard.

Petitioner cites only three cases as even potentially conflicting with the Kansas Supreme Court's decision in this case. Even a quick reading of those cases reveals that they fail to create a genuine and significant conflict of authority with the decision at issue here.

First, in *State v. Daniel*, 12 S.W.3d 420 (Tenn. 2000), the Tennessee Supreme Court never even decided the question Petitioner raises. Rather, in a *footnote*, the court observed that the "State concedes, and *we accept for purposes of this decision* . . . that, if a seizure took place, the drugs found in Daniel's pocket must be suppressed as tainted 'fruit of the poisonous tree.'" *Id.* at 422 n.2 (emphasis added).

Indeed, the Tennessee Supreme Court was clear in the first sentence of its opinion that

> [t]he dispositive issue in this appeal is whether a 'seizure' within the meaning of the Fourth Amendment to the United States Constitution and Article I, section 7 of the Tennessee Constitution occurred when a police officer approached the defendant, Brian Daniel, in the parking lot of a convenience store, asked Daniel to produce some identification, and retained Daniel's identification to run a computer check for outstanding warrants.

Id. at 422. The Tennessee Supreme Court never decided the issue Petitioner now presents; instead that court *assumed* the conclusion Petitioner seeks here, and did so after the state in *Daniel* apparently conceded the question. *Daniel* is no basis for a grant of certiorari in this case.

Second, *United States v. Luckett*, 484 F.2d 89 (9th Cir. 1973), is a *three paragraph per curiam* opinion (two paragraphs describing the case, one paragraph of "analysis") issued thirty-five years ago, predating by two years the Court's decision in *Brown v. Illinois*, 422 U.S. 590 (1975), which sets forth the proper framework for analyzing the issue in this case. The Kansas Supreme Court here followed and applied *Brown*; the Ninth Circuit in *Luckett* did not do so, could not have done so, and in any event did not discuss or analyze the factors *Brown* later recognized as governing. *Luckett* is no basis for a grant of certiorari here.

Third, Petitioner points to *People v. Mitchell*, 355 Ill. App. 3d 1030, 824 N.E.2d 642 (2005), an *intermediate state appellate court* decision which, by definition under Rule 10(b), has no bearing on whether an exercise of this Court's certiorari jurisdiction is warranted. That said, *Mitchell* actually supports the proposition that the Kansas Supreme Court applied the correct analysis in this case. The *Mitchell* court applied the three factors the Court articulated in *Brown v. Illinois*, just as the Kansas Supreme Court did here. In deciding to suppress evidence, the *Mitchell* court acknowledged that many courts had rejected "fruit of the poisonous tree" claims in outstanding warrant cases, including the Seventh Circuit in *United States v. Green*, 111 F.3d 515 (7th Cir. 1997), but it distinguished those cases *on their facts*, not on the law. See *Mitchell*, 355 Ill. App. 3d at 1036–37. Indeed, all of the post-1975 cases Petitioner cites rely upon and apply *Brown v. Illinois*, as did the Kansas court here. *Mitchell* is no basis for certiorari review in this case.

Finally, even Petitioner acknowledges that no less than four state supreme courts and the Eighth Circuit likely would reach the same outcome as the Kansas Supreme Court in this case, with four of those decisions coming within the last five years, and all of them within the last ten years. Pet. 8–9. Moreover, Petitioner fails to cite or discuss the many other decisions that have held that any "taint" has been dissipated when police discover and rely upon a valid, outstanding arrest warrant. In particular, Petitioner fails to cite the Seventh Circuit's decision

in *United States v. Green, supra*, a case frequently relied upon and followed in subsequent cases from many jurisdictions. Nor does Petitioner cite the many state cases that predate *United States v. Green* and apply the *Brown v. Illinois* analysis. "Other courts around the nation have also held that outstanding arrest warrants supply probable cause to arrest, and thereby, provide an intervening circumstance under *Brown* [*v. Illinois*] which dissipates the taint of an initial illegal encounter." *State v. Hill*, 725 So. 2d 1282, 1285 (La. 1998) (citing cases from Colorado, Nebraska, Texas and Washington, as well as the Seventh Circuit's decision in *Green*). Simply put, there is no conflict of authority warranting certiorari review.

II. THIS CASE DOES NOT INVOLVE POLICE MISCONDUCT OR ABUSE OF POWER.

Petitioner's purported concerns about a police-state run amok are simply misplaced. This case presents no such scenario. Reading the lower court opinions, it is clear that this was not a case of the police randomly stopping someone on the street and running a warrant check to see if they might find something. As the Kansas Supreme Court declared, "[t]here is nothing to suggest that the officers' ultimate goal in making contact with [Petitioner], who was in the immediate vicinity of the urinator, was to search his person for drugs." App. 16a.

To the contrary, police had already stopped a man who appeared likely to be a companion of Petitioner's and who admitted his intent to engage in unlawful

conduct when stopped. Petitioner was nearby ("about 20 feet", App. 3a) and, like the urinator, had a bicycle. Further, Petitioner's counsel conceded that the officers' initial encounter with Petitioner was voluntary. These facts fail to present an example of flagrant or abusive misconduct by police. App. 16a ("[W]e do not perceive the conduct to be flagrant.").

Moreover, on the merits, Petitioner's arguments fly in the face of common sense and many lower court decisions. "Where a lawful arrest pursuant to a warrant constitutes the 'intervening circumstance' (as in this case), it is an even more compelling case for the conclusion that the taint of the original illegality is dissipated." *United States v. Green*, 111 F.3d at 522. That is because "where a lawful arrest due to an outstanding warrant is the intervening circumstance, consent (or any act for that matter) by the defendant is not required. Any influence the unlawful stop would have on the defendant's conduct is irrelevant." *Id.* Thus, in cases involving outstanding warrants, "there is less 'taint' than in the cases already recognized by the Supreme Court and this and other circuits as fitting within the intervening circumstances exception." *Id.*

CONCLUSION

The Kansas Supreme Court's decision not to suppress the illegal drugs discovered in Petitioner's pocket in a search incident to his arrest on a valid, outstanding warrant is correct and raises no issues meriting certiorari review. The petition should be denied.

Respectfully submitted,

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No. 08-a

In the Supreme Court of the United States

PAUL B. MARTIN

Petitioner,

v.

STATE OF KANSAS

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Kansas

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

The State does not dispute that the question presented regarding the attenuation doctrine arises with great frequency. Nor could it: as we discuss in the petition (at 9-11), police officers today routinely seize citizens in a variety of settings for the purpose of conducting a warrant check—even though the officers lack any particularized basis to justify the seizure—and then arrest and search the individual if an outstanding warrant is discovered. The question whether evidence discovered in that search may be admitted even though it is the product of the unlawful seizure is one that lower courts face in a large number of cases.

The State also does not argue that the issue is unimportant. Indeed, the Fourth Amendment was adopted in large part to prevent random detentions of citizens by government authorities, but that is the precise law enforcement technique that is encouraged by the decision below.

The opposition to certiorari instead rests on two grounds: the alleged absence of a conflict among the lower courts and the supposed lack of proof here of "police misconduct or abuse of power" (Opp. 5). Neither argument provides any basis for denying review. To the contrary, the State's contentions confirm that review by this Court is plainly warranted.

First, the State's efforts to explain away the conflicting decisions are unavailing. In *State* v. *Daniel*, 12 S.W.3d 420 (Tenn. 2000), the prosecution's concession (see Opp. 2-3) related only to the absence of the individualized suspicion necessary to justify a seizure, and not to whether the evidence should have been suppressed. That is why the Tennessee Su-

preme Court in its opinion did not analyze the issue of individualized suspicion but did provide an explanation of the reason why suppression was appropriate: "since no intervening event or other attenuating circumstance purged the taint of the initial illegal seizure." *Id.* at 428.

Indeed, the admission of the evidence in *Daniel* had been upheld by the Tennessee intermediate appellate court solely on grounds of attenuation; it is inconceivable that the State would have conceded that issue in the state supreme court. *State* v. *Daniel*, 1998 Tenn. Crim. App. LEXIS 611, *6 (June 10, 1998) ("we find that the 'degree of attenuation here was sufficient to dissipate the connection between' the purported illegal seizure and the discovery of the" evidence), rev'd, 12 S.W.3d 420 (2000); see also *State* v. *McKenzie*, 2003 Tenn. Crim. App. LEXIS 1009, *21 n.2 (Dec. 3, 2003) (subsequent decision citing *Daniel*'s attenuation holding).

Moreover, the State is wrong in asserting (Opp. 4) that the holding in *People* v. *Mitchell*, 824 N.E.2d 642 (Ill. App. Ct. 2005), rests on the particular facts of the case. To the contrary, it rests on facts that are common to all of these cases: officers illegally seized a citizen for the purpose of running a warrant check and then arrested and searched the individual on the basis of the warrant discovered pursuant to the check. As the *Mitchell* court observed, "the purpose of the stop"—to run a warrant check—"was directly related to the arrest of defendant, which then led directly to the search of defendant." 824 N.E.2d at 649.

Mitchell's facts are replicated here. The officer seized petitioner in order to run a warrant check. When the warrant was discovered, the officer conducted a search. The issue, as in *Mitchell*, is whether the evidence discovered in that search should be

suppressed. The conflict among the lower courts is clear.

Second, the State argues (Opp. 5-6) that certiorari is not appropriate because (a) the initial detention of petitioner was voluntary; (b) the seizure of petitioner was not random; and (c) the officers' purpose was not to search petitioner for illegal drugs. These attempts to defend the officers' conduct on the merits have little relevance to the Court's certiorari decision. To the extent they are relevant, they provide further justification for review by this Court.

Although the initial detention of petitioner was voluntary, that is true in virtually all of these cases: the officer typically approaches an individual and asks a question. The interaction is transformed into a seizure when the officer retains the individual's identification for the purpose of conducting the warrant check—indeed, the State here did not even seek review of the intermediate appellate court's holding that petitioner was illegally seized. Pet. 4-5.

The claim that petitioner was not selected at random is also irrelevant. The practice of law enforcement officers is to conduct a warrant check of virtually everyone with whom they interact. The officer here testified that he did so "90-plus percent of the time when we stop someone." Supp. Tr. 10.

Officers generally are able to say that they approached a particular individual on the basis of some "hunch" short of individualized suspicion sufficient to seize the individual—after all, officers cannot approach everyone and they therefore must decide who they wish to stop. If such a hunch were sufficient to sever the link between the illegal detention and the discovery of the evidence, law enforcement officers would have a very strong incentive to engage in unconstitutional random seizures—precisely what the

exclusionary rule is designed to prevent. *Brown* v. Illinois, 422 U.S. 590, 609 (1975) (Powell, J., concurring) ("[t]he notion of the 'dissipation of the taint' attempts to mark the point at which the detrimental consequences of illegal police action become so attenuated that the deterrent effect of the exclusionary rule no longer justifies its cost")

Finally, in none of the warrant check cases is the purpose of the seizure to conduct a search for contraband. The purpose is to conduct the warrant check. That direct link between the purpose and the search necessitates suppression, because "the answer to the question, whether the evidence was obtained by exploiting the original illegality, is undeniably yes." *Mitchell*, 824 N.E.2d at 650. Suppressing the evidence is "the only way to deter the police from randomly stopping citizens for the purpose of running warrant checks" because under the contrary rule adopted by the court below "there would be no reason for the police not to stop whomever they please to check for a warrant." *Ibid.*

For these reasons, and the reasons stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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